314 U.S. 650

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

FEDERAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
LESTER ETTMAN,
Respondent.

No. 560

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

WAYNE ELY,
Tenth Floor, Commerce Bldg.,
St. Louis, Missouri,
Attorney for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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No. .....

PETITION FOR A WRIT OF CERTIORARI.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Federal Life Insurance Company, a corporation, respectfully shows to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit in equity to rescind a policy of disability benefit insurance issued by petitioner in favor of respondent. The suit was originally filed in the United States District Court for the Eastern District of Missouri, and is based upon the proposition that respondent induced petitioner to issue the policy by making false and fraudulent representations in his application.

The value of the amount in controversy is in excess of the sum or value of $3,000.00. Upon respondent's motion to dismiss petitioner's bill of complaint, the said District Court entered an order and judgment of dismissal, from which judgment petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit, which Court of Appeals affirmed the judgment of the District Court. Petition for rehearing was denied and petitioner brings the case here by petition for a writ of certiorari.

THE FACTS.

The complaint of petitioner, filed July 13, 1940 (R. 3), alleges that on January 3, 1928, respondent made written application to petitioner for an insurance policy to provide indemnities of $300.00 a month for disability; that in his application respondent represented that he had never suffered from any difficulty with his eyesight, and had not consulted any physician or other practitioner for any ailment or disease since 1924, whereas, in truth and in fact, respondent was, at the time of signing and executing said application for said insurance policy, suffering from a degenerative disease of the eyes known as retinitis pigmentosa; that he had been suffering from said disease for a long time prior to the execution of the application, and that he had many times consulted and been treated by physicians for said disease and condition of his eyes; that said statements and representations by respondent were false and known by him to be false at the time he made them; that they were knowingly made for the purpose of deceiving petitioner and inducing petitioner to issue said policy of insurance, and with intent to deceive petitioner to believe that he was an insurable risk and was not suffering from any difficulty, disease or condition of the eyes; that petitioner was deceived by said false and fraudulent representations and that being so deceived petitioner exe-

cuted and issued said policy, and that it would not have issued the policy of insurance had it known that the said statements and representations of respondent were false.

The complaint further alleges that on April 17, 1940, respondent notified petitioner that he was suffering from retinitis pigmentosa and had lost his eyesight as result thereof; that petitioner thereupon made an investigation, and on or about June 5, 1940, received information for the first time that respondent was suffering from retinitis pigmentosa at the time he applied for the policy, which information was confirmed to petitioner on July 11, 1940, on which last date petitioner, for the first time, had positive knowledge that respondent was, at the time of the execution of said application and for several years prior thereto had been, suffering from retinitis pigmentosa, whereupon petitioner forthwith and on July 12, 1940, tendered respondent restitution of the premiums paid by him to petitioner, together with interest thereon, and demanded return of the policy, which said offer of restitution and tender of payment respondent refused and likewise refused to render up said policy.

The complaint further alleges that under the rules of the Insurance Departments of Missouri and Illinois and in accordance with sound actuarial practices and principle, it was required to and did on April 17, 1940, set up a reserve of $3,750.00 on said policy pending determination of its liability thereunder. Petitioner deposited into the registry of the court $1,406.13, representing the premiums paid by respondent on said policy and interest thereon from the dates of payment to the date of the deposit (July 13, 1940); alleged that it had no adequate remedy at law, and prayed that said insurance policy be rescinded and set aside, and prayed that respondent be forever restrained and enjoined from setting up or claiming any right or in-

terest under said policy and from claiming any benefits thereunder.

The complaint alleges that the value of the amount in controversy between petitioner and respondent is in excess of the value of $3,000.00, exclusive of interest or costs. A photostatic copy of respondent's application is marked "Exhibit A," attached to the complaint and made a part thereof, and a photostatic copy of the policy issued in response to said application is marked "Exhibit B," attached to the complaint and made a part thereof.

On July 24, 1940, respondent filed a suit at law in the Circuit Court of the City of St. Louis, Missouri, against petitioner (R. 28), alleging issuance of the said insurance policy by petitioner in January, 1928; that the policy provided for a monthly indemnity of $300.00 to respondent in the event of the loss of his eyesight as a result of accidental injury or sickness; that he lost the sight of both eyes in January, 1936, and that petitioner was indebted to him in the sum of $16,200.00 at the time of filing said suit at law, and prayed judgment for said amount, together with 10 per cent penalty, and an attorneys' fee of $3,000.00.

Said suit at law was duly removed by petitioner from said Circuit Court to the said United States District Court for the Eastern District of Missouri.

On August 6, 1940, respondent filed a motion in the United States District Court for the Eastern District of Missouri to dismiss petitioner's complaint in equity (R. 25), on the grounds (1) that petitioner had an adequate remedy at law; (2) that the controversy upon which the policy became payable occurred prior to the filing of suit by petitioner; (3) that if petitioner has a defense it could assert the same at law; (4) that the suit at law filed by respondent in said Circuit Court was pending and that

all the issues between the parties could be decided therein; (5) that petitioner's complaint is without equity.

On December 19, 1940, the said District Court sustained respondent's motion to dismiss petitioner's complaint in equity, and entered an order and judgment of dismissal of said complaint (R. 26). Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and on the 24th day of June, 1941, the said Circuit Court of Appeals affirmed the judgment of said District Court (R. 46). Petition for a rehearing was denied on July 28, 1941 (R. 53), and petitioner brings the case here by petition for writ of certiorari.

The case was briefed, argued and submitted to the United States Circuit Court of Appeals and was argued orally before said court on May 7, 1941.

In its brief and at the oral argument petitioner complained to the said Circuit Court of Appeals that the District Court erred in dismissing petitioner's bill of complaint; that petitioner does not have an adequate remedy at law; that it was entitled to a trial of the issues raised by its bill of complaint; and that it was error for the District Court to dismiss the petition without hearing the case on its merits, and petitioner, in its said brief, filed in said Circuit Court of Appeals, presented to said Court for its determination and decision the following propositions of law in the following language:

> "I. The Court erred in dismissing the plaintiff's petition in its suit to rescind the policy.
>
> "This was an equity suit to rescind and set aside a policy of insurance on the ground that the policy was procured by the making of false and fraudulent representations of fact, and the making of incomplete and untrue answers to certain pertinent questions in the

application for the policy, which amounted to legal fraud; that the matters misrepresented were material, and affected the acceptance of the risk and the hazard assumed by the Federal Life. The petition sets forth that the Federal Life only recently discovered the fraud, and promptly tendered a return of the premiums paid and demanded a return of the policy, which was refused; and alleges that the Federal Life will suffer an irreparable injury unless afforded relief in equity. The petition, therefore, states a cause of action and presents an issue which the Federal Life is entitled to have tried."

"II. The plaintiff, Federal Life Insurance Company, does not have an adequate remedy at law.

"(a) The insured is living and there is consequently no possible way in which plaintiff can secure the full relief to which it is entitled except in equity."

"(b) At the time the Federal Life Insurance Company filed its petition in this case no suit on the policy had been instituted, and the company therefore could not set up as a defense the facts showing nonliability."

"(c) The judgment in favor of the Federal Life in the law action brought by Ettman after this suit was filed would not afford the Federal Life the relief to which it is entitled under the allegations in its suit to rescind the policy, and such judgment would not be res judicata in a subsequent suit upon the policy by Ettman unless the jury should find in such subsequent suit that the matter misrepresented in procurement of the policy actually contributed to the contingency or event giving rise to such subsequent suit."

"III. The Federal Life is entitled to trial of the issues raised by its petition filed in this case, and it was error for the Court to dismiss the petition without hearing the case on its merits.

"The sole question presented by Ettman's motion to dismiss this suit was whether plaintiff's petition, construed in the light most favorable to plaintiff,

stated a claim upon which relief could be granted. This question can only be decided after a trial on the merits."

Petitioner herein, appellant in the Circuit Court of Appeals, cited cases and authorities for each of the above propositions of law and argued said propositions and complained of each of them to the said Circuit Court of Appeals.

On June 24, 1941, the said Circuit Court of Appeals filed its opinion affirming the judgment of the District Court, in which opinion said Court of Appeals held:

"that the contingency upon which the plaintiff became liable on the policy had occurred and defendant was asserting a liability against the plaintiff based upon the policy. The question which we have to decide is not whether the plaintiff has stated in its complaint a good defense to the policy, but whether it can now invoke the equitable jurisdiction of the court, and this, in turn, is dependent upon whether it has an adequate remedy at law" (Rec. p. 44).

"Defendant has the opportunity in the action at law to contest its liability. The defense of fraud and misrepresentation being available as a defense to the action at law, the bill in equity cannot be entertained to cancel the policy" (Rec. p. 44).

"* * * the contingency has happened which definitely and permanently fixes the liability of the insurance company. The policy covered only a monthly indemnity in the maximum amount of $300.00 per month. The liability for this indemnity had already occurred prior to the commencement of the suit in equity, and that liability could not be increased by any subsequent contingency. The policy provides that:

" 'The Monthly Indemnity of this Policy is $300.00. If the Insured shall suffer the Loss of Both Hands or of Both Feet or of One Hand and One Foot or of the

Sight of Both Eyes as a result of accidental injury or sickness, such loss shall be deemed to cause thereafter a permanent loss of all of his business time and the Company will pay said monthly indemnity as long as he shall live.'

"Under these circumstances, the obligation to pay became fixed and absolute. Thereafter, the monthly indemnity became legal demands. To these legal demands the plaintiff may plead the defense of fraud and misrepresentation, and if that issue should be sustained, the judgment establishing fraud in the procurement of the policy would be *res judicata*, which can be availed of as to all subsequent claims for indemnity" (Rec. pp. 45, 46).

On July 8, 1941, petitioner filed its motion for a rehearing in said Circuit Court of Appeals in which it presented to said Circuit Court of Appeals the following propositions of law in the following language:

"I. The contract of insurance with which we are here concerned is a Missouri contract, and the validity of any claim must be determined by the laws of Missouri" (R. 47, 48).

"II. Furthermore, the decision of this Court that 'the defense of fraud and misrepresentation being available as a defense to the action at law, the bill in equity cannot be entertained to cancel the policy,' is contrary to the decisions of the Missouri courts" (R. 49).

Petitioner cited cases and authorities for each of the propositions of law presented to the Court in its said motion for a rehearing, but said Circuit Court of Appeals overruled petitioner's said motion for a rehearing on July 28, 1941.

Petitioner submits that the said Circuit Court of Appeals committed error in deciding said propositions of law so

presented to it by petitioner both in petitioner's original brief filed in said court and in its motion for a rehearing. Wherefore, petitioner presents to this Honorable Court the following questions:

QUESTIONS PRESENTED.

I.

Is an insurance company entitled to invoke the equitable jurisdiction of a United States District Court to cancel or rescind a policy of insurance issued by it in response to false and fraudulent representations and statements made by the assured, when such false and fraudulent representations are material to the risk insured against?

II.

Does the opportunity of an insurance company to contest an action at law to recover under a policy of disability insurance, on the ground that the policy was procured through fraud and misrepresentation material to the disability claimed deprive the insurance company of its right to maintain a bill in equity to cancel the policy?

III.

Where an insurance company defends against a suit of law to collect disability benefits under an insurance policy on the ground that the policy was obtained through fraud and misrepresentation, material to the disability claimed, will a judgment establishing fraud in the procurement of the policy bar any and all subsequent claims for indemnity under the policy, without a showing that the fraud practiced in the procurement of the policy is material to the contingency upon which said subsequent claim is based?

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals that petitioner's bill in equity cannot be entertained to cancel the policy because petitioner has the opportunity to defend against the action at law brought by respondent after institution of the equity suit, and to contest its liability in the law action on the ground that the policy was procured through fraud and misrepresentation is in direct conflict with the decisions of the Supreme Court in **American Life Insurance Company v. Stewart**, 300 U. S. 203, 81 L. Ed. 605; **Dawson v. Kentucky**, 255 U. S. 288, 296, 41 S. Ct. 272, 65 L. Ed. 638; Cf. **McClellan v. Carland**, 217 U. S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762; **Clements v. Macheboeuf**, 92 U. S. 418, 23 L. Ed. 504, and **Metcalf v. Williams**, 104 U. S. 93, 26 L. Ed. 665, 666.

(a) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of other Circuit Courts of Appeals:

Jefferson Standard Life Ins. Co. v. Keeton (C. C. A. 4), 292 F. 53, 54-56;
Jefferson Standard Life Ins. Co. v. McIntyre (C. C. A. 5), 294 F. 886, 888 (3);
New York Life Ins. Co. v. Seymour (C. C. A. 6), 45 F. (2) 47, 49 (4);
Densby v. Acacia Mutual Life Ins. Co. (C. C. A. D. C.), 78 F. (2) 203, 206 (5).

(b) The said decision of the Circuit Court of Appeals is in direct conflict with its own prior decisions in the following cases:

Lincoln Nat. Life Ins. Co. v. Hammer (C. C. A. 8), 41 F. (2) 12, 16 (1 and 2);

Terry v. New York Life Ins. Co. (C. C. A. 8), 104 F. (2) 498, 500;
Leimer v. State Mutual Life Assurance Co. (C. C. A. 8), 108 F. (2) 302.

(c) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of the Supreme Court of Missouri and the Missouri Courts of Appeals:

Hanson v. Neal, 215 Mo. 256, 279, 114 S. W. 1073, 1080, 1081 (18);
New York Life Ins. Co. v. Cobb, 219 Mo. A. 609, 282 S. W. 494, 497 (3).

(d) In failing and refusing to apply the law of Missouri in determining the right of petitioner to maintain its bill in equity in this case, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court in **Erie Railroad Company v. Tompkins,** 304 U. S. 64, 78, 58 Sup. Ct. 817, 82 L. Ed. 1188, 1194, and in **Chicago & A. R. Co. v. Wiggins Ferry Company,** 108 U. S. 18, 27 L. Ed. 636.

II.

The decision of the Court of Appeals that a judgment in the suit at law establishing fraud in the procurement of the policy would be res judicata as to all subsequent claims for indemnity is in direct conflict with its own prior decision in **Terry v. New York Life Ins. Co.,** 104 F. (2) 498, 501-502 (beginning with last paragraph on p. 501).

(a) The said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of the Supreme Court of Missouri and the Missouri Courts of Appeals:

Aetna Life Ins. Co. v. Daniel, 328 Mo. 876, 42 S. W. (2) 584, 588 (10);

Schuermann v. Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723;
Birch Tree State Bank v. Dowler, 167 Mo. A. 373, 151 S. W. 784, 785 (2, 3);
Smith v. Dye, 88 Mo. 581;
O'Malley v. Northwestern Mutual Life Ins. Co., 231 Mo. A. 39, 95 S. W. (2) 852, 858. Certiorari denied (1936) **Northwestern Mutual Life Ins. Co. v. O'Malley**, 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, and that the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
Tenth Floor, Commerce Bldg.,
St. Louis, Missouri,
Solicitor for Petitioner.